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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-417

LA-TEX SUPPLY COMPANY,
Petitioner,

v.

FRUEHAUF TRAILER DIVISION, FRUEHAUF CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VINCENT W. REHMET
Attorney for Petitioner

Of Counsel:

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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IN THE

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LA-TEX SUPPLY COMPANY,

Petitioner,

v.

FRUEHAUF TRAILER DIVISION, FRUEHAUF CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on June 25, 1971.

OPINION BELOW

The opinion of the Court of Appeals is not reported as of this date but is printed as Appendix A, infra.

JURISDICTION

The Court of Appeals entered judgment on June 25, 1971 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

I. Was the trial jury illegally constituted in that it consisted of 13 members rather than the required 12 members?

II. Did the trial court commit reversible error in permitting an alternate juror to retire to the jury room with the regular 12 jurors and thereafter participate in the jury deliberations?

III. Was Petitioner deprived of a legally constituted jury by the trial court in permitting an alternate, or thirteenth, juror to retire to the jury room with the regular jurors, even though the alternate juror was cautioned not to participate in the deliberations unless a regular juror was excused?

IV. Assuming agreement by Petitioner's trial counsel to the trial court's procedure (which is denied), was there nevertheless a basic denial of the type of trial by jury guaranteed under the Seventh Amendment, Constitution of the United States?

CONSTITUTION PROVISION AND PROCEDURAL RULE INVOLVED

Seventh Amendment, Constitution of the United States, is set forth in Appendix C to the Petition. Rule 47(b), Federal Rules of Civil Procedure, is set forth in Appendix D annexed hereto.

STATEMENT OF THE CASE

The United States District Court's jurisdiction in the two cases consolidated for trial was based upon diversity of citizenship, under Section 1332(a)(1) of the United States Judicial Code (U.S.C.A. Title 28, Sec. 1332(a)(1)).

Petitioner, La-Tex Supply Company, brought suit in the United States District Court for the Eastern District of Texas (Civil Action No. 4943) for the value of a truck-tractor and trailer-tank damaged in a fire and explosion resulting from the negligence of Respondent, Fruehauf Trailer Division, Fruehauf Corporation.

A separate suit (Civil Action No. 5032) was brought against Respondent in the same court by the Estate of J. D. Woolworth and 29 other individuals and companies for property damage to business establishments, automobiles and other property resulting from the same occurrence.

These actions were consolidated and over Petitioner's objection La-Tex Supply Company was substituted as the Plaintiff in said Civil Action No. 5032.

Petitioner left the trailer-tank at Respondent's repair facility at Shreveport, Louisiana, for servicing and repairs. Although not requested to do so, Respondent attempted to de-gas the tank before the repairs started. When its own steam apparatus failed to function, Respondent delivered the tank to a machinery and welding shop in Bossier City, Louisiana, where it was de-gassed by steam. Moisture was left in the tank. After the trailer tank was picked up by Petitioner's employee the tank was filled with propane at a refinery at Carthage, Texas. Shortly thereafter, and while driving in downtown Carthage, propane began spewing from a three-inch globe valve (which had been closed by the Petitioner's driver before the tank was filled with propane) and the fire and explosion ensued. It was apparent that moisture and condensation left in the tank had caused the valve to "freeze" in a partially open position.

Trial was to a jury only on the issue of liability. In response to a general charge submitted to it the jury found for the defendant (Respondent) and judgment based on such jury verdict was rendered for Respondent and against Petitioner.

At the conclusion of the evidence it was learned that one of the jurors might have to be excused in order to attend a

funeral. The Court informed all of the jurors, and trial counsel, of this fact and stated that he was going to permit the alternate juror, a Mrs. Dyer, to retire with the jury. The alternate juror was admonished by the Court not to participate in the deliberations of the jury and to say nothing until and unless the regular juror should have to be excused to attend the funeral. The alternate juror, Mrs. Dyer, remained with the 12 regular jurors through their deliberations.

Upon the hearing of Petitioner's motion for new trial, the affidavits of six jurors, including the foreman, were submitted to and received by the trial court. Such affidavits reflect that the alternate, or 13th juror "made some statements while the jury was deliberating" and "Mrs. Dyer participated at least to a limited extent during the deliberations" and "Mrs. Dyer made comments and statements while we were discussing who was to blame" and "I believe we were discussing contributory negligence at the time."

One defense theory submitted to the jury in the Court's charge was the alleged contributory negligence of Petitioner's truck driver. The affidavit of the jury foreman reflects that the jury did in fact conclude that Petitioner's truck driver employee was contributorily negligent, and such finding was the basis of the verdict for the defendant.

The statement contained in the Court of Appeals opinion that Mrs. Dyer only stated, "Let's listen to the foreman" and termed such "remark" to be of an "innocuous nature" is factually incorrect.

Likewise, the Court of Appeals misstates the facts when it make the unqualified observation, "We do not consider any of the authorities cited as applicable, since the procedure followed with respect to the alternate juror was explained to and *agreed upon by counsel for both parties* be-

fore the jury entered the jury room." (Emphasis Supplied).

The record reflects that Respondent's trial counsel testified on the hearing of Petitioner's motion for new trial that the trial judge approached the attorneys for both parties in chambers, informed them of the problem, told them of his proposed solution and inquired whether any of the attorneys had any objection to the procedure. According to Respondent's counsel, Petitioner's trial counsel voiced no objection or perhaps even stated, "Your Honor, we have no objection to that." However, the two attorneys who represented Petitioner below testified that they were merely told by the trial court of the procedure he intended to follow and were given no opportunity to voice or make an objection. No court reporter was present. Petitioner's attorneys recalled that they were in a hallway near the Court's secretary's office or near a room containing a coffee bar at the time they were so advised by the Court.

The trial court did not make any specific findings or write an opinion in connection with the denial of the motion for a new trial, and in view of the disputed testimony of the three attorneys who tried the case, it is grossly unfair for the Court of Appeals to state that counsel "agreed" to the procedure.

Candor and fairness require counsel preparing this petition to reveal that the trial judge, on the hearing, stated:

> "I will state for the record that my recollection of the events relating to the 13th juror comport with that of defendant's counsel. I would certainly under no circumstances ever adopt such an unorthodox procedure as was adopted in this case without inquiring specifically of counsel for each side whether or not such a proposed procedure met with their approval or whether or not there was objection thereto."

REASONS FOR GRANTING THE WRIT

Petitioner's suit was of a nature entitling it to a trial by jury preserved and guaranteed under the Seventh Amendment, Constitution of the United States. (Appendix C.)

The right is implemented by Rule 38(a), Federal Rules of Civil Procedure, reading:

> "RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 47(b), Federal Rules of Civil Procedure, provides:

> "ALTERNATE JURORS: The Court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualify to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and the same challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. *AN ALTERNATE JUROR WHO DOES NOT REPLACE A REGULAR JUROR SHALL BE DISCHARGED AFTER THE JURY RETIRES TO CONSIDER ITS VERDICT. . . . . .*" (Emphasis Supplied).

Such rule clearly permits the substitution of an alternate juror for a regular juror *only prior to the time that the jury retires* to consider its verdict.

Federal Jury Practice and Instructions by Mathis & Devitt, Section 2.04:

> A jury consisting of more than 12 jurors is not a legal constitutional jury and a trial by such a jury is erroneous, and no valid judgment can be rendered on the verdict. *Wolfe* v. *Martin,* 2 Mississippi 30, and *Whitehurst* v. *Davis,* 3 North Carolina 113."

This Court in the case of *Patton* v. *United States,* 281 U. S. 276, stated:

> " 'Trial by jury' means a trial by a jury as understood and applied in common law, and includes all the essential elements as they were recognized in this country and in England when the Constitution was adopted.
>
> "These elements are: (1) that the jury should consist of 12 men, *neither more nor less,* (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and to advise them in respect to the facts, and (3) that the verdict should be unanimous." (Emphasis Supplied).

The decision of the Court of Appeals is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit as rendered in *United States of America* v. *Virginia Erection Corporation,* 335 F.2d 868 (4th Cir. 1964) where the identical procedure was condemned and the case reversed. Moreover, the opinion reflects that counsel for both the government and the defendants *agreed* to the procedure.

The Court cited Rule 24(c), Federal Rules of Criminal Procedure, which states:

> "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disquali-

fied to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

PETITIONER RESPECTFULLY POINTS OUT THAT THIS RULE OF CRIMINAL PROCEDURE IS WORDED EXACTLY AS THE RULE OF CIVIL PROCEDURE (47(B)) WHICH HAS BEEN HERETOFORE CITED. The Fourth Circuit opinion discusses the Rule of Criminal Procedure and states that this rule is explicit in defining the function of an alternate juror and the time when his replacement of a disqualified regular juror begins, that is, prior to the time when the jury retires to consider its verdict. The Court said that even if the alternate juror obeyed the instructions of the Court and remained silent during deliberations, that it was entirely possible that his or her attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors. The opinion correctly states that the presence of the alternate in the jury room *violated the cardinal principle that the deliberations of the jury shall remain private and secret in every case.* The presence of the alternate juror may have operated to some extent as a restraint upon the jurors and their freedom of action and expression. The Fourth Circuit held that the action of the District Court in permitting an alternate juror to retire to the jury room was *reversible error even though counsel agreed to the procedure and even though the alternate juror was admonished not to participate in the deliberations of the jury.*

Federal Practice and Procedure by Barron and Holtzoff, Volume 2B, page 322, under the subject of "Trials—Jurors" states:

> "The rule permits an alternate juror to replace a regular juror only prior to the time the jury retires to consider its verdict. If one of the jury is taken ill, or otherwise disabled after the jury has retired, there is no recourse but a mistrial. To permit substitution of an alternate at that point would require either that the alternate participate though he has missed part of the jury deliberation, or that the alternate sit in with the jury in every case on the chance he might be needed. Probably because of constitutional doubts as to either course, the rule does not permit this."

The very presence in the jury room of an alternate juror is an invasion of the right of trial by jury. The well-established principle is that the jury is entitled, and bound to deliberate in private. If a stranger, whether an officer of the Court or not, is present for a substantial time during the jury's deliberations, then the verdict is vitiated. Whether or not the alternate juror did or did not deliberate with the jury, her very presence in the jury room operated as a restraint upon the jury's freedom of action and expression. When a jury retires from the presence of the Court, it is in order that they may have the opportunity for private and confidential discussion, and the necessity for this is assumed in every case. The presence of a single other person in the room is an intrusion upon the privacy and confidence and tends to defeat the purpose for which the jury is sent out. This general rule has been stated in numerous criminal cases and applies with equal force to civil cases. *People* v. *Bruneman,* 40 Pacific 2d 891 (Calif. App. 1935), *People* v. *Britton,* 45 Pacific 2d 368 (Calif. App. 1935), 102 A.L.R. 1067.

Reversible error was found in *Glenn* v. *State,* 123 S.E2d 896 (1962), where the trial court charged the jury that an alternate juror should go into the jury room with them, but would take no part in the discussion as long as the original 12 were able to function. In *People* v. *King,* 216 N.Y.S.2d 638 (1961), the Court pointed out that the code did not permit more than 12 jurors to participate in the actual deliberations under any circumstances.

A conviction was reversed and a new trial ordered in *Brigman* v. *State,* 350 Pacific 2d 321 (1960), where it appeared that an alternate juror had joined the regular 12 when the jury retired to deliberate and took part in one ballot by the jury. Although it was indicated that the first ballot was more favorable to the defendant than any other ballots the Appellate Court held that it was immaterial and that the defendant's fundamental rights had been violated in that 13 persons had been permitted to participate in the jury's deliberations.

Permitting two alternate jurors to retire to the jury room after submission of the case to the jury, even though on objection by the defendant they were withdrawn ten minutes later, was held reversible error in *Commonwealth* v. *Krick,* 67 Atlantic 2d 746 (1949). Also see 84 A.L.R.2d 1312.

In *United States* v. *Harry Barfield Company, Inc.,* 359 F.2d 120, the Court of Appeals for the Fifth Circuit stated:

> ". . . The integrity of the jury system is no less to be desired in civil cases than in criminal cases."

In view of the conflict in the decisions on the same subject matter, and under its supervisory power, it is respectfully submitted that review by this Honorable Court is appropriate.

CONCLUSION

For the foregoing reasons advanced, the petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1304

LA-TEX SUPPLY COMPANY,
Plaintiff-Appellant,

versus

FRUEHAUF TRAILER DIVISION,
FRUEHAUF CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(June 25, 1971)

Before COLEMAN, SIMPSON and RONEY,
Circuit Judges.

PER CURIAM: La-Tex Supply Company (La-Tex), the plaintiff below and appellant here, turned over its trailer-tank, used to deliver propane gas, to Fruehauf Trailer Division, Fruehauf Corporation (Fruehauf), the defendant below, for servicing and repairs. Fruehauf delivered the trailer-tank to Britt's Machinery and Welding Company (Britt's) of Bossier City, Louisiana, for de-gasing and steam cleaning without prior permission from La-Tex. Britt's employees removed the gas, steam cleaned the inside of the tank, whereupon it was pulled to Frue-

hauf's place of business and returned to a La-Tex driver. The driver drove the tank to the La-Tex refinery, filled it with propane and proceeded along his delivery route. As the rig reached downtown Carthage, Texas, the driver noticed gas spilling from the rear of the tank, but before he could reach his cutoff valve the propane ignited and exploded causing property damage to several surrounding business establishments and destroying the La-Tex tank truck. La-Tex sued claiming that the cause of the gas leak and resultant explosion was moisture left in the tank by the sub-contractor Britt. Fruehauf defended on the dual grounds that it was not responsible for the negligence of an independent contractor (Britt's) and on the further ground of La-Tex's claimed contributory negligence in failing to close the valve properly. The jury found for Fruehauf. La-Tex appeals on several grounds, none of which appear to us to be meritorious and we accordingly affirm.

At the conclusion of the evidence it was learned by court and counsel that one of the regular jurors might need to be excused in order to attend a funeral on the following day. The jury was advised by the court of this fact. He stated that he would allow the alternate juror to go with the other jurors into the jury room but cautioned the alternate juror not to participate in the deliberations unless and until the regular juror was excused. Despite this caution the alternate, a lady juror, made at least one remark during the course of the jury's deliberation, when she entered into a colloquy between several of the regular jurors, including the foreman, saying: "Let's listen to the foreman". This was made to appear by affidavits of several jurors submitted in connection with the motion for new trial below. We are cited Rule 37(b) of the Federal Rules of Civil Procedure, the Supreme Court decision of *Patton* v. *United States,* 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, the Fourth Circuit case of *United States* v. *Virginia Erec-*

tion Corporation, 4 Cir. 1964, 335 F.2d 868, and several other cases in support of La-Tex's position that predjudicial error occured below. We do not consider any of the authorities cited as applicable, since the procedure followed with respect to the alternate juror was explained to and agreed upon by counsel for both parties before the jurors entered the jury room. Despite earnest efforts to inflate it into more serious proportions, we think that the innocuous nature of the remark speaks for itself.

The trial was a joint trial of La-Tex's claim and a separate suit covering the claims of several of the other parties injured by the explosion, referred to in this record as "Cause No. 5032". Cause No. 5032 was originally brought by plaintiff's counsel, Otto A. Ritter, as Trustee, with him named as the plaintiff. The claims involved had been paid by La-Tex or its insurors, and assignments taken in the name of Mr. Ritter. At pre-trial, and on motion of Fruehauf, La-Tex was substituted as the named plaintiff with respect to these aggregated claims. Prejudicial error is claimed to have occurred by this procedure as working in a deprivation of the right of the several claimants to have their claims tried by jury and as improperly shifting the burden of proof to La-Tex. We find the argument without substance, since those persons having disposed of their claims for the cash value thereof no longer had any right to recover against Fruehauf or to have their claims tried by a jury. We are of the view that the real party in interest under Rule 17(a), F.R.Civ.P., was the owner of the assigned claims, La-Tex.

Further, we are not persuaded that the district judge abused the discretion committed to him under Rule 41, F.R.Civ.P., when he refused to permit La-Tex during the course of the trial to take a voluntary dismissal of Cause No. 5032.

Finally, La-Tex points to Title 28, U.S.C., Section 1359[1], and asserts that the several claims comprising Cause No. 5032, none of which involved as much as $10,000.00, were impermissibly stacked or aggregated so as to come within the juridictional amount in controversy. The answer to this contention depends on what we have indicated above: that La-Tex was the real party in interest and the owner by assignment of the various claims aggregated in Cause No. 5032, and that under Rule 18, F.R.Civ.P., the plaintiff may, "* * * join * * * as many claims, legal, equitable, or maritime, as he has against an opposing party".

The judgment appealed from is in all respects

AFFIRMED.

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[1] "§ 1359. Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

APPENDIX B

UNITED STATES COURT OF APPEALS

EDWARD W. WADSWORTH
Clerk

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130
(504) 527-6514

OFFICE OF THE CLERK

June 25, 1971

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Re: No. 71-1304 — La-Tex Supply Co. v. Fruehauf Trailer Div., Fruehauf Corp.

Gentlemen:

Enclosed is a copy of the Court's opinion this day rendered in the above case. *A judgment has this day been entered* in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively.

Very truly yours,
EDWARD W. WADSWORTH
Clerk

By FRANCES WOLFE
Deputy Clerk

enc.

cc: Mr. Otto A. Ritter
Mr. William H. Howell
Messrs. Richard Grainger
Mike A. Hatchell
Mr. Marion R. Shepard

APPENDIX C

United States Constitution, Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX D

Rule 47(b), Federal Rules of Civil Procedure

(b) Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

As amended Feb. 28, 1966, eff. July 1, 1966.

Supreme Court, U.S.
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No. 71-417

LA-TEX SUPPLY COMPANY,
Petitioner,

vs.

FRUEHAUF TRAILER DIVISION, FRUEHAUF CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

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No. 71-417

LA-TEX SUPPLY COMPANY,

Petitioner,

vs.

FRUEHAUF TRAILER DIVISION, FREUHAUF CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF OF THE RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Comes now Fruehauf Corporation, as Respondent, and files this, its brief, in opposition to the Petition for Writ of Certiorari filed herein in which it would show the court as follows:

JURISDICTION

The Respondent does not contest jurisdiction of the court on the Petition for Writ of Certiorari. 28 U.S.C. § 1254 (1).

RULES OF PROCEDURE INVOLVED

Throughout the Petition for Writ of Certiorari, and this brief, references are made to *Rule 24(c), Federal Rules of Criminal Procedure.* For comparative purposes, that rule and *Rule 47(b), Federal Rules of Civil Procedure*, are reproduced as Appendices A and B hereto.

STATEMENT OF THE CASE

If the Petitioner's exculpatory statement (Petition 3), *de hors* the record, of the manner in which occurred the accident made the basis of this suit were pertinent to this appeal, Respondent would be forced to challenge its accuracy. However, at no point during this appeal has Petitioner challenged the legal or factual sufficiency of the evidence to support the verdict. Thus, for present purposes, it need only have been stated in the Petition that the case was tried to a jury on disputed facts, which were resolved in Respondent's favor by the jury's verdict, upon which a take-nothing judgment was entered accordingly. (App. 261-262.)*

*All "App." references herein are to the Appendix filed in the court below which, we presume, is now an official part of the record in this case.

ARGUMENT AND AUTHORITIES

There are three substantial, well-grounded legal reasons why the trial court's procedure utilizing the alternatate juror does not constitute reversible error—(1) the Petitioner's agreement to the procedure, (2) the Petitioner's failure to preserve any complaint to it, and (3) the lack of any prejudice from it—any one of which is a sufficient basis for denying the petition, to-wit:

I.

With the agreement of counsel for both parties, it was entirely permissible for the alternate juror to enter the jury room during the deliberations.

When the trial court stated into the record that "***my recollection of the events relating to the 13th juror comport with that of Defendant's Counsel***" (App. 317), that should have settled, once and for all, the question of whether or not Petitioner's counsel "agreed" to the procedure which permitted the alternate juror to enter the jury room under instructions not to participate in the deliberations, because Defendant-Respondent's counsel testified, as follows, that such agreement was made:

After making the proposal to counsel that the alternate juror be sent into the jury room, under instructions not to participate, as a potential replacement for the juror who needed to be absent the following day (App. 303, 311-312), the trial court pointedly asked counsel for both parties: "Do you have any objection to this procedure?" (App. 303.) Neither attorney voiced

any objection; in fact, Mr. Ritter, trial counsel for Petitioner, replied:

> "Your Honor, we have no objection to that." (App. 304.)

Counsel for Respondent voiced his assent to the procedure likewise. (App. 304.)

Despite the trial court's affirmation of the agreement just quoted, we find Petitioner, at this late date, still contending* that no such agreement occurred, although, in this court, it attacks the problem differently. Instead of flatly denying the agreement, as it did below**, the contention now is that it is "grossly unfair" (Petition 5) to hold Petitioner to the agreement, because (1) the evidence of its making was conflicting, and (2) the trial court did not file any findings of fact resolving the conflict.

To answer that contention, it is sufficient to note that *Rule 52, Federal Rules of Civil Procedure*, provides that "***(f)indings of fact . . . are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." Since Petitioner did not request any formal findings relative to making the "agreement" in question, the trial court's

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* "*** it is grossly unfair for the Court of Appeals to state that counsel 'agreed' to the procedure." (Petition 5.)

** "*** There is no record that the attorney for Appellant either approved or assented to the thirteenth juror entering the jury room (App. 311, 315-316). The court never did inquire as to whether or not Appellant's counsel, and certainly did not inquire of the Apellant's representative, as to whether or not any approval was given this procedure. ***" (Reply Brief for the Appellant, LaTex Supply Company 2.)

statement into the record adopting defense counsel's version of the event, constitutes a finding sufficient, so Respondent submits, to establish that the agreement was made. On top of that, the trial court's order overruling Petitioner's motion for a new trial operates to raise the presumption that the trial court resolved any and all factual disputes as to the making of the "agreement" in favor of the order entered.

Thus, the record establishes beyond cavil that Petitioner *did* agree to the particular use of the alternate juror, of which it now complains. The question, then, is whether or not that agreement rendered proper the alternate juror procedure employed? It certainly did!

It is true, of course, that permitting the alternate juror to enter the jury room is not specifically contemplated by *Rule 47(b), Federal Rules of Civil Procedure.* That is not to say, however, that the procedure delineated by the rule is so inviolate that it cannot be varied by consent of the parties. In criminal cases, where the jury stands as a final bulwark between an accused and the potentially oppressive State, there is much justification for a strict, literal interpretation of the federal rules regarding selection, impaneling, and deliberation of the jury. In civil cases, however, the jury stands more as an impartial arbiter than it does as a guardian. Since the only ones affected by a suit of this nature (i.e., for property damage) are the two parties to it, there is no justification for an interpreta-

tion of the rules under which the case is tried that is so unbending and so inflexible that the parties (who alone are affected) cannot agree to vary those rules—especially when such agreement will promote an orderly and efficient disposition of the case.

That is undoubtedly why the Federal Rules of Civil Procedure themselves have made substantial changes in the traditional, common law jury concept. For example, Rule 38 requires that the guaranteed right to jury trial be requested specifically by one of the parties, or else it is forfeited; Rule 48 permits the litigants to agree to a jury of less than 12; and the latter rule also permits an agreement for the parties to be bound by a verdict of a stipulated majority of jurors.

Thus, in civil cases, the traditional aspects of the common law jury are no longer sacrosanct. Following the direction of the federal civil rules, it logically follows that, in a civil case, the parties are free to agree merely to permit an alternate juror to sit in, without participation, on the jury's deliberations. Especially should this be true when the procedure agreed to will avoid a mistrial and costly re-trial of the case. And, that was certainly the result of the "agreement" here, because the only alternative, had the affected juror been required to leave, was to declare a mistrial. See *2B Federal Practice and Procedure (Barron and Holtzhoff) 322, "Trials—Jurors," § 1031 (1961).*

Indeed, the cases confirm the validity of such agreements. Even the criminal cases, which have construed *Rule 24(c), Federal Rules of Criminal Procedure*—the identical counterpart to Civil Rule 47(b)—are in accord that an agreement to vary the rule's prescribed use of an alternate juror is both permissible and effective. For example, in *Leser vs. United States, 358 F. 2d 313 (9th Cir. 1966), cert. den. 385 U. S. 802,* it came to light that the jury's deliberations might not terminate before one of the jurors was scheduled to enter the hospital for surgery. In order to avoid the mistrial which would have been occasioned by that occurrence, counsel for both the government and the defendant agreed that the alternate jurors would not be released, but would be retained and substituted should any one juror become ill or disabled from continuing. Later, one of the alternate jurors was, in fact, substituted for the juror who entered the hospital.

Technically, that procedure contravenes Rule 24(c), but, upon defendant's complaint to it, the Ninth Circuit found that the parties' agreement was sufficient to override the rule's limited wording. The court stated:

> "In our view the record fully establishes that the appellants knowingly and intelligently acquiesced in the voluntary stipulation of their counsel. We believe that the stipulation entered into by appellants' counsel in the presence of the appellants, who expressed no dissent therefrom, is effective and binding upon the appellants. See Eury v. Huff, 141 F. 2d 554 (4th Cir. 1944); United States v.

> Sorrentino, 175 F. 2d 721 (3d Cir. 1949); Cruzado v. People v. Puerto Rico, 210 F. 2d 789 (1st Cir. 1954)." (358 F. 2d 317.)

To the same effect is the following, self-explanatory holding from *Union Electric Light & Power Co. vs. Snyder Estate Co., 15 F. Supp. 379 (D.C. Mo. 1936):*

> "There is still another reason why this question should be ruled against defendants. The parties stipulated that, in a certain contingency, the case might be decided by a jury of eleven or of ten men, that even a lawful juror or two lawful jurors might be excused by the judge if sufficient reason for excusing him or them should arise. The fine purpose of this stipulation was to prevent a mistrial from some adventitious cause which could not be foreseen nor prevented. Discovery that a lawful juror was so ill mentally that he could not function would have warranted his discharge under the stipulation. That a juror was incompetent because he was an imposter certainly would have been equally within the purpose of the stipulation." (15 F. Supp. 382.)

See also: *Leser vs. United States,* 390 F. 2d 634 (9th Cir. 1968), cert. den., 391 U. S. 953; *Larson vs. General Motors Corporation,* 148 F. 2d 319, 322-323 (2nd Cir. 1945), cert. den., 319 U. S. 762.

United States vs. Virginia Erection Corporation, 335 F. 2d 868 (4th Cir. 1964), relied upon so heavily by Petitioner, is not to the contrary. First of all, it is a criminal case, which, as already mentioned, will stand a more literal application of the rules of procedure. Still, the procedure which, in that case, permitted the alter-

nate juror to enter the jury room, upon agreement of counsel, was *not* found to be erroneous on the theory that no such agreement could be made; rather, it was condemned because the defendants *themselves* did not *personally* consent to the procedure. That is clear from the following language (and the underscoring) in these quotations from the opinion:

> "* * *There is nothing in the record to show that the defendants *personally* consented to the arrangement." (335 F. 2d 870, Note 3.)
>
> "The Government contends that the defendants waived their right to object to any possible violation of constiutional rights and waived objection to noncompliance with the Federal Rules of Criminal Procedure. It relies principally upon the landmark decision in Patton v. United States, supra. In that case one of the jurors became disabled during trial but before the case was submitted to the jury. Thereupon counsel for the defendants and the Government stipulated in open court that the case should proceed with the remaining eleven jurors. The defendants *personally* assented and the trial court approved the stipulation. The Supreme Court held that the defendants had waived their right to a constitutional jury of twelve but made it clear that 'before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the *express and intelligent consent of the defendant*.' (Emphasis supplied.) 281 U.S. 276, 312, 50 S.Ct. 253, 263." (335 F. 2d 870.)
>
> "It is obvious that Rule 23(b) was intended to follow the teaching of Patton. Twelve is the magic number. If the number is to be reduced, a *written* stipulation of the parties provides the best record evidence of the *express* consent of a defendant.

***" (335 F. 2d 871, emphasis the court's throughout.)

For that reason, there is no need for Respondent to challenge the correctness of *Virginia Erection*, although it could be noted that its result is contrary to later cases in which this court has denied certiorari. See *Leser vs. United States, supra, 358 F. 2d 313 (9th Cir. 1966)* and cases cited therein at 358 F. 2d 317.

Thus, the propriety of the use of the alternate juror in this case is supported by the agreement of record, by case authority, and by good sense as well.

II.

By failing to object until after the verdict to the use of the alternate juror, Petitioner waived any complaint it had to the procedure.

If the "agreement" were not in this case, the question would still remain: If the use of the alternate juror were truly the grievous deprivation of constitutional rights, which Petitioner contends it was, why was there no objection to it until after the adverse verdict? What was the effect of that failure to object?

The fact is that no objection was made—until the motion for new trial—and there was ample opportunity to do so in time to have avoided or cured the so-called error. The record reveals that, after the trial court made it known to counsel how he proposed to use the alternate juror, both parties returned into open court

to charge the jury, at which time formal objection could have been made (either before the charge or after the jurors had retired) to the procedure adopted by the court. Moreover, if an objection had been made at that time, the procedure would *not* have been employed at all, for, as the court remarked at the conclusion of the hearing on the motion for new trial:

> "***I would certainly under no circumstances ever adopt such an unorthodox procedure as was adopted in this case without inquiring specifically of Counsel for each side whether or not such a proposed procedure met with their approval or whether or not there was objection thereto." (App. 317-318.)

Of course, it is, and has been, the philosophy of the federal courts to eliminate needless appeals by requiring seasonable objection in the trial court to matters deemed erroneous in order that they might be cured or eliminated at that point. Or, as this court noted when it summarily rejected an analogous point in *Francis vs. Southern Pacific Co., 68 S. Ct. 611, 333 U. S. 445, 450-451, 92 L. Ed. 798, 804 (1948):*

> "Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to Thiel v. Southern P. Co. 328 U.S. 217, 90 L ed 1181, 66 S Ct 984, 166 ALR 1412. We do not stop *to inquire into the merits of the claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the Thiel Case was decided a few weeks after the verdict of the jury in the present case. If not an afterthought, it is an effort to re-

> trieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late. Cf. Queenan v. Oklahoma, 190 U.S. 548, 552, 47 L ed 1175, 1178, 23 S Ct 762." (333 U.S. 450-451, 92 L. Ed. 804.)

A like holding is found in *Union Electric Light & Power Co. vs. Snyder Estate Co., supra, 15 F. Supp. 379 (D.C. Mo. 1936)*, as follows:

> "Upon the argument of the motion, answering the contention of plaintiff's counsel that failure to act after knowledge constituted a waiver of any objection to the fact that Mariner wrongfully had become a member of the jury, counsel for defendants said it was too late to object after Mariner had been excused. Clearly the contention is not so answered. If it was too late to make the objection after Mariner was excused and before verdict, it is certainly too late to make the objection after verdict.
>
> "If the objection now to Mariner has such merit as that because of it the verdict should be set aside, it would have supported a motion to discharge the jury before the verdict. A party cannot gamble with the possibility of a favorable verdict and then thereafter, when the verdict proves unfavorable, raise a question he might have raised before the verdict." (15 F. Supp. 382.)

Since a timely objection to the trial court's use of the alternate juror would have eliminated that procedure, it follows that Petitioner's silence as to the procedure until nine days after judgment constituted a classic waiver of any objection it had thereto. *Larson vs. Gen-*

eral Motors Corporation, supra, 148 F. 2d 319, 323 (2nd Cir. 1945), cert. den. 319 U.S. 762; Leser vs. United States, supra, 358 F. 2d 313, 318 (9th Cir. 1966), cert. den. 385 U.S. 802; Union Electric Light & Power Co. vs. Snyder Estate Co., supra, 15 F. Supp. 379 (D.C. Mo. 1936).

III.

The record discloses no prejudice within the meaning of Rule 61 from the presence of the alternate juror in the jury room.

Even if it could successfully be contended (and it cannot) that the court's use of the alternate juror was not agreed to and that objection thereto was not waived, still, no affirmative relief could be afforded on the petition, because no prejudice is shown to have resulted from that procedure within the meaning of *Rule 61, Federal Rules of Civil Procedure.*

While Petitioner attempts to make it appear that the alternate juror actually engaged in the substantive discussions of the jury relative to contributory negligence (Petition 4) that is not true—as Petitioner should well know. As the Court of Appeals correctly noted, the only specific statement which can be attributed to Mrs. Dyer is her innocent request to the effect that "***the jurors should listen to the foreman, Mr. Thompson***" (App 274), or that "***'Everyone should be quiet and listen'***" (App. 279), or that she "***told all of the jurors that they should listen to what the foreman, Mr. Thompson, had to say.***" (App. 278.)

True, the affidavits of some jurors (quoted in the petition at page 4) attempt to state *when* or at *what point* in the deliberations Mrs. Dyer made her comment (e.g., "****I believe we were discussing contributory negligence *at the time* the statements were made. ***"—App. 276, emphasis added), but none of the affidavits reveal any specific statement by the alternate juror other than as quoted above.

There is no evidence that the alternate juror voted on the verdict, or that any juror was influenced by, or was caused to vote the way he did, because of anything the alternate juror said; and there is no evidence that the alternate juror's mere presence had the slightest effect upon any particular juror or upon the jurors' discussions in general. In short, there is nothing to show that the result in the case would have been any different had the alternate juror not been in the jury room.

A demonstration of prejudice definitely is required from alleged error regarding selection or use of alternate jurors. For example, even the Second Circuit, which holds to a very narrow construction of Criminal Rule 24(c), nevertheless, in *Nash vs. United States, 398 F. 2d 944 (2nd Cir. 1968), cert. den., 393 U.S. 961,* held that the trial court's failure to discharge alternate jurors upon submission of the case, as required by Criminal Rule 24(c), did not require reversal because:

> "On the record before us, we cannot find that the defendant Nash was *prejudiced* by the presence

> of the alternates.***" (398 F. 2d 950-951, emphasis added.)

To the same effect is *Ellenbogen vs. United States, 365 F. 2d 982 (2nd Cir. 1966), cert. den., 369 U.S. 923,* where a regular juror was actually replaced during the course of the trial by the alternate, but, still, no reversible error was found in that irregular procedure, because no prejudice was shown. The court held:

> "Appellant asserts that it was error for the trial judge to excuse, with appellant's consent, a juror who became ill during the course of the trial, and to replace the juror with an alternate. The substitution of an alternate for a juror for reasonable cause is within the prerogative of the trial court and does not require the consent of any party. *A party claiming to be injured by such action is entitled to a new trial only on a clear showing of prejudice to him.* In the present case the appellant has failed to show any injury or prejudice whatever. See United States v. Houlihan, 332 F. 2d 8, 13 (2 Cir.), cert. denied, 379 U.S. 828, 85 S.Ct. 56, 13 L.Ed. 2d 37 (1964); United States v. Woodner, 317 F. 2d 649, 652 (2 Cir. 1963). This court will not presume prejudice without some plain showing to that effect, United States v. Woodner, supra; United States v. Zambito, 315 F. 2d 266, 269 (4 Cir.), cert. denied, 373 U.S. 924, 83 S.Ct. 1524, 10 L.Ed. 2d 423 (1963)." (365 F. 2d 989, emphasis added.)

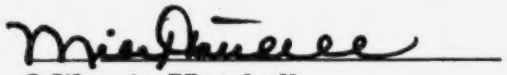
See also *Nash vs. United States, 414 F. 2d 234, 236 (2nd Cir. 1969), cert. den., 396 U.S. 940; Morgan vs. Sun Oil Co., 109 F. 2d 178, 180 (5th Cir. 1940), cert. den., 310 U.S. 40; Union Electric Light & Power Co. vs. Snyder Estate Co., supra, 15 F. Supp. 379 (D.C. Mo. 1936).*

CONCLUSION

It is apparent that, under any one of several theories —i.e., agreement, waiver, lack of prejudice—the judgments below are correct and there are no sufficient legal or equitable reasons why the petition should be granted. Accordingly, it should be overruled forthwith. *Rule 19, Rules of the Supreme Court of the United States, 1970.*

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petition for Writ of Certiorari herein be denied forthwith. Respondent additionally prays for such other and further relief to which it may justly be entitled at law or in equity.

Respectfully submitted,



Mike A. Hatchell

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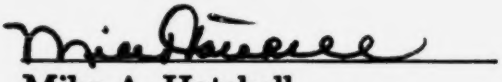
CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the foregoing brief in opposition have been served upon Plaintiff-Petitioner by depositing the same in the United States mail, first class, postage prepaid, addressed to Mr. Vincent Rehmet, 12th Floor, The Main Building, 1212 Main Street, Houston, Texas, 77002, on this the 16th day of October, 1971.



Mike A. Hatchell

APPENDIX

APPENDIX A

Rule 24(c), Federal Rules of Criminal Procedure.

* * * * *

"(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

APPENDIX B

Rule 47(b), Federal Rules of Civil Procedure.

* * * * *

"(b) Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror."